89-1284

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FOWLER INDUSTRIES, INC.; FOWLER ELECTRIC CO., INC.; STEVE FOWLER ELECTRICAL CONTRACTORS, INC.; CLARK ELECTRICAL CONTRACTORS, INC.; and SAMUEL LEWIS FOWLER, JR., INDIVIDUALLY,

Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 613,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

IRA J. SMOTHERMAN, JR.
(Counsel of Record)

ADRIENNE L. ANDERSON
STOKES, SHAPIRO, FUSSELL & WEDGE
2300 First Atlanta Tower
Atlanta, Georgia 30383
(404) 658-9050
Counsel for Fowler Industries, Inc.; Fowler Electric Co., Inc.; Steve Fowler Electrical Contractors, Inc.; Clark Electrical Contractors, Inc.; and Samuel Lewis Fowler, Jr., individually

Tower Printing Company, 2 Peachtree St., Atlanta, Georgia 30383 (404) 659-4080

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QUESTIONS PRESENTED

1. Whether an "appropriate bargaining unit" determination is required in a suit brought by a union pursuant to § 301 of the Labor Management Relations Act ("LMRA") seeking to enforce a collective bargaining agreement not only against a company which signed the agreement, but also against companies which did not sign the agreement under the theory that the companies are a single employer or are alter egos of one another.

2. Whether the National Labor Relations Board (the "Board") must make the initial "appropriate bargaining unit" determination in such a case.

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No. ____

IN THE

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OCTOBER TERM, 1989

FOWLER INDUSTRIES, INC.; FOWLER ELECTRIC CO., INC.; STEVE FOWLER ELECTRICAL CONTRACTORS, INC.; CLARK ELECTRICAL CONTRACTORS, INC.; and SAMUEL LEWIS FOWLER, JR., INDIVIDUALLY,

Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 613,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, Fowler Industries, Inc.; Fowler Electric Co., Inc.; Steve Fowler Electrical Contractors, Inc.; Clark Electrical Contractors, Inc.; and Samuel Lewis Fowler, Jr., respectfully pray that the Court issue a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on September 25, 1989.

OPINION BELOW

The Opinion of the Eleventh Circuit appears as Appendix A hereto and is officially reported as *International Brotherhood of Electrical Workers Local 613 v. Fowler Industries, Inc.*, 884 F.2d 551 (11th Cir. 1989). The Opinion of the United States District Court for the Northern District of Georgia appears as Appendix B hereto and is officially reported as *International Brotherhood of Electrical Workers Local 613 v. Fowler Industries Inc.*, 691 F. Supp. 1431 (N.D. Ga. 1988).

JURISDICTION

The Judgment of the Eleventh Circuit Court of Appeals was entered on September 25, 1989. The Eleventh Circuit's Order On Petition(s) For Rehearing and Suggestion(s) of Rehearing In Banc denying the Petitioners' request for rehearing was entered on November 14, 1989. This Court's jurisdiction is invoked pursuant to 28 U.S.C.A. § 1254(1).

STATUTES INVOLVED

The statutes involved in this petition are the Labor Management Relations Act § 301(a), the National Labor Relations Act § 7, and the National Labor Relations Act § 9(b), all of which are set forth verbatim in Appendix E.

STATEMENT OF THE CASE

The Petitioners are four companies involved in the electrical contracting business — Fowler Electrical Co., Inc. (hereinafter "FEC"), Fowler Industries, Inc. (hereinafter "FI"), Steve Fowler Electrical Contractors, Inc. (hereinafter "SFEC") and Clark Electrical Contractors, Inc. (hereinafter "CEC") — and Samuel L. Fowler, Jr., the president of FEC. Since 1962 FEC has been a signatory to a collective

bargaining agreement with the International Brotherhood of Electrical Workers, Local Union 613 (hereinafter the "Union"). FI, SFEC, and CEC were incorporated and started business in 1983. Neither FI, SFEC, nor CEC has executed any collective bargaining agreement with the Union.

The Union filed the present action in the United States District Court for the Northern District of Georgia pursuant to § 301(a) of the Labor Management Relations Act, 29 U.S.C.A. § 185(a) (hereinafter referred to as "§ 301"), asserting the same statute as grounds for the federal court's jurisdiction.[1] In both the original complaint filed March 23, 1987, and the Amended Complaint filed October 26, 1987, the Union alleged that FEC, FI, SFEC and CEC are collectively bound to the collective bargaining agreement signed by FEC and the Union. As grounds for enforcing the collective bargaining agreement against FI, SFEC, and CEC despite the fact that they did not sign the agreement, the Union alleged that the four companies constitute a single employer and, alternatively, that the four companies are merely alter egos of one another.

On March 17, 1988, the Petitioners filed their Motion to Dismiss the Complaint on the grounds that in order to enforce the collective bargaining agreement against the non-

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[1] § 301(a) provides:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

signatory companies, there must be not only a finding that the companies constitute a single employer or are alter egos of one another, but also a finding that the combination of employees of all four companies constitutes an "appropriate bargaining unit," a determination which only the National Labor Relations Board (hereinafter the "Board") can make. Accordingly, the Petitioners moved the District Court to dismiss the Complaint for lack of jurisdiction.

On July 21, 1988, the District Court issued its judgment and order dismissing the Complaint on the grounds that an "appropriate bargaining unit" determination was required for resolution of the case and that the initial unit determination should be made by the Board. (App. B.) The Union appealed the District Court's decision to the Eleventh Circuit Court of Appeals, alleging that no unit determination was necessary, but that if the District Court required such a determination, then the District Court had concurrent jurisdiction with the Board to make the unit determination.

On September 25, 1989, the Eleventh Circuit Court of Appeals panel entered its judgment and opinion reversing the District Court's decision on the grounds that no "appropriate bargaining unit" determination was required for enforcement of the economic terms of the agreement against non-signatories if the court determined that the non-signatories were alter egos of the signatory company or part of a "single employer" which included the signatory company. (App. A and C.) The Eleventh Circuit's Order On Petition(s) For Rehearing and Suggestion(s) of Rehearing In Banc denying the Petitioners' request for rehearing was entered November 14, 1989. (App. D.)

The corporate defendants and Mr. Fowler now petition this Court for a Writ of Certiorari to the Eleventh Circuit to review that court's decision and settle important questions of federal labor law regarding the requirements for enforcement of a collective bargaining agreement against an employer who never signed the agreement.

REASONS FOR GRANTING THE WRIT

I. WHETHER AN "APPROPRIATE BARGAINING UNIT" DETERMINATION IS REQUIRED IN A § 301 BREACH OF CONTRACT SUIT AGAINST AN EMPLOYER WHO NEVER SIGNED THE COLLECTIVE BARGAINING AGREEMENT IS A QUESTION OF EXCEPTIONAL IMPORTANCE IN FEDERAL LABOR LAW WHICH THE ELEVENTH CIRCUIT DECIDED IN CONFLICT WITH PRIOR DECISIONS OF OTHER CIRCUIT COURTS.

Review on a Writ of Certiorari is appropriate "[w]hen a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; . . ." Supreme Court Rule 17.1(a). *See, e.g., Bingler v. Johnson*, 394 U.S. 741 (1969); *United States v. Muniz*, 374 U.S. 150 (1963).

The Eleventh Circuit's decision that an "appropriate bargaining unit" determination is unnecessary in the Union's § 301 action to enforce its collective bargaining agreement against both FEC and the companies who did not sign the agreement directly conflicts with the Fifth Circuit's decision in *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983) (hereinafter *Pratt-Farnsworth*), and the Ninth

Circuit's decision in *Brotherhood of Teamsters, Local No. 70 v. California Consolidators, Inc.*, 693 F.2d 81 (9th Cir. 1982), *cert. denied*, 469 U.S. 887 (1984), *reh'g denied*, 469 U.S. 1066 (1984) (hereinafter *California Consolidators*). Accordingly, it is essential that the Court review the Eleventh Circuit's decision and resolve the conflict between the circuits on this important question of federal labor law.

In this case, the Union invoked the "single employer" and "alter ego" theories because it must establish a ground for binding the non-signatories to the agreement, or the District Court must dismiss its claims against those non-signatories. *See Pratt-Farnsworth*, 690 F.2d at 503. As both the District Court and the Eleventh Circuit recognized, a § 301 breach of contract suit against a non-signatory based on these theories must be resolved under federal law developed in accordance with the "single employer" and "alter ego" theories established by the Board. (App. A, pp. 3a-4a; App. B, p. 7b.)

Both the "single employer" doctrine and the "alter ego" theory, as developed by the Board and as adopted by the Fifth Circuit in *Pratt-Farnsworth*, require a two-step analysis. Under the "single employer" theory, the Board first determines whether the circumstances of the case and the absence of an arm's-length relationship indicate that two or more distinct business entities should be treated as a single employer. *N.L.R.B. v. Don Burgess Construction Corp.*, 596 F.2d 378, 384 (9th Cir. 1979), *cert. denied*, 444 U.S. 940 (1979). However, "[t]he fact that two companies have been designated a single employer for purposes of the Act is not determinative as to whether both are bound by a union contract signed by one of them. This requires that the

employees of each constitute a single bargaining unit." *Id.* at 386. The test for this second determination is whether there is a "community of interests" between the employees. *Pratt-Farnsworth*, 690 F.2d at 505; *N.L.R.B. v. Belcher Towing Co.*, 284 F.2d 118, 121 (5th Cir. 1980).

The "alter ego" doctrine developed by the Board also requires a two-step analysis. The Board first determines whether the non-signatory company is an alter ego of the signatory company, focusing on "the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or a technical change in operations." *Pratt-Farnsworth*, 690 F.2d at 508. *See also Hageman Underground Construction and Operating Engineers Local Union No. 3*, 253 N.L.R.B. 60, 70 (1980). The "alter ego" situation most commonly arises in successorship situations, where the actual operation of the company does not change. *Pratt-Farnsworth*, 690 F.2d at 507. Accordingly, although the district court must still determine that the employee unit is an appropriate bargaining unit, the scrutiny of the unit is much more limited under the "alter ego" analysis, requiring only a finding that the unit is not repugnant to the policies of the National Labor Relations Act. *Id.* at 508-509.

The rationale for the "appropriate bargaining unit" requirement is "to protect the rights under Section 7 of the NLRA, 29 U.S.C. § 157, of the employees of each of the subentities constituting the single employer to bargain collectively with representatives of their own choosing." *Pratt-Farnsworth*, 690 F.2d at 507.[2] As the Fifth Circuit rec-

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[2] Section 7 also provides:

ognized in *Florida Marble Polishers Health and Welfare Trust Fund v. Edwin M. Green, Inc.*, 653 F.2d 972 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982), to automatically apply the terms of a collective bargaining agreement to the employees of the non-signatory employer in a so-called "double-breasted" operation:

> . . . usurp[s] not only the [non-signatory's] employees' right of self-determination under section 7 of the NLRA, 29 U.S.C. § 157, but also the authority of the NLRB under section 9(b), 29 U.S.C. § 159(b), to determine the appropriate bargaining unit for those employees.

Id. at 976.[3]

In *Pratt-Farnsworth*, the Fifth Circuit adopted the Board's "single employer" and "alter ego" theories for application to § 301 breach of contract actions pursuant to this Court's mandate in *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957), that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our

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> Employees shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

[3] One consequence of applying the collective bargaining agreement to the employees of the non-signatory employers is that employees who never anticipated union representation are suddenly bound by the terms of a union's agreement with an entity with whom the employees have no relationship.

national labor laws." *Id.* at 456. Accordingly, in *Pratt-Farnsworth*, the Fifth Circuit expressly held that in a § 301 action against a non-signatory employer for breach of the collective bargaining agreement, the court must find *both* that the signatory and non-signatory companies are actually a single employer or alter egos *and* that the employees of the signatory and non-signatory companies together constitute an appropriate bargaining unit. *Pratt-Farnsworth*, 690 F.2d 509-513.

The Ninth Circuit Court of Appeals also adopted the two-step analysis for the application of the "single employer" theory in *Brotherhood of Teamsters, Local No. 70 v. California Consolidators, Inc.*, 693 F.2d 81 (9th Cir. 1982), *cert. denied*, 469 U.S. 887, *reh'g denied*, 469 U.S. 1066 (1984). Relying on prior Board decisions and this Court's decision in *South Prairie Construction Co. v. Local 627*, 425 U.S. 800 (1976), the Ninth Circuit held that even if a district court decides in a § 301 action that two companies constitute a single employer, "a single employer conclusion fails to determine that the employees form a single or an appropriate bargaining unit," a necessary requirement for binding the non-signatory to the agreement. *California Consolidators*, 693 F.2d at 83.

Thus, the Eleventh Circuit's decision that no "appropriate bargaining unit" determination is necessary for enforcement of the collective bargaining agreement against the non-signatory companies is contrary to *Pratt-Farnsworth, California Consolidators*, and the Board decisions from which the federal courts adopted the "single employer" and "alter ego" doctrines. (See App. A, p. 8a-9a.)

In its opinion, the Eleventh Circuit noted this conflict:

> We realize that our holding is directly contrary to that of *Pratt-Farnsworth*, in which the new Fifth Circuit held that enforcement of the economic terms of a pre-hire agreement against a non-signatory sub-entity of a single employer
>
> > requires a showing that the two sub-entities are a single employer and then requires a further *independent* determination that their employees constitute an appropriate bargaining unit . . .

(App. A; p. 11a, n.4.)

Furthermore, the Eleventh Circuit's reasoning that "[i]f the Union prevails on the merits of either its 'single employer' or its 'alter ego' claim, the contract language itself will determine the employees to whom FI, SFE[C] and CEC owe the pay and benefits specified by the agreement," (App. A, p. 10a), is directly contrary to the Fifth Circuit's statement in *Pratt-Farnsworth* that "[t]he decision that the employees of the two subentities constitute an appropriate unit . . . *cannot be disguised in contractual garb* but must be encountered head-on as a bona fide representational issue." *Pratt-Farnsworth*, 690 F.2d at 521 (emphasis added).

The Fifth Circuit in *Pratt-Farnsworth* explained that although a contractual stipulation as to the appropriate bargaining unit will limit the court's inquiry in that the court will not be free to *create* an appropriate bargaining unit, it must still make an independent determination of the appropriateness of the stipulated unit once it includes the employees of the non-signatory company. *Id.* at 525. By contrast, the Eleventh Circuit has effectively held that if the court determines that there are sufficient connections

between the signatory and non-signatory companies to conclude that the companies are actually a single employer or are alter egos of one another, then the employees of both companies are identically bound by the collective bargaining agreement negotiated by the Union, regardless of whether the employees' interests are sufficiently similar to have been adequately represented by a single union during the negotiation of the agreement, and regardless of whether grouping the employees together for identical treatment under the collective bargaining agreement is repugnant to the policies of the Act.

Furthermore, under the Eleventh Circuit's decision, the non-signatory companies are obligated to their employees under the terms of an agreement designed to protect the interests of the *signatory* company's employees, regardless of whether there are sufficient similarities between the interests of the two employee groups to logically or justifiably impose the same contractual obligations on the non-signatory company. For these reasons, the "appropriate bargaining unit" determination is of critical importance to both employees and employers.

Thus, the Eleventh Circuit's opinion has created a conflict between the circuits on the important question of whether an "appropriate bargaining unit" determination is required in a § 301 suit against a company which did not sign the collective bargaining agreement. Accordingly, the Court should review the Eleventh Circuit's decision in order to resolve this conflict and settle this important question.

II. THE ELEVENTH CIRCUIT FUNDAMENTALLY MISCONSTRUED AND MISAPPLIED SUPREME COURT PRECEDENT IN HOLDING THAT IT IS UNNECESSARY TO MAKE AN "APPROPRIATE BARGAINING UNIT" DETERMINATION IN A § 301 BREACH OF CONTRACT ACTION AGAINST A NON-SIGNATORY.

A writ of certiorari should issue "[w]hen a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." Supreme Court Rule 17.1(c). *See also Wilkinson v. United States*, 365 U.S. 399 (1961), *reh'g denied*, 365 U.S. 890 (1961).

In reaching its decision, the Eleventh Circuit fundamentally misapplied this Court's decision in *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983). In *Jim McNeff* this Court resolved the question of whether the union's status (as a minority union) prevented it from enforcing the agreement against an employer *admittedly* a signatory to the agreement.[4] The Eleventh Circuit failed to recognize the significance of the fact that in *Jim McNeff* the union sought

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[4] The Eleventh Circuit correctly cited *Jim McNeff* for the proposition that a union may enforce the economic terms of a voluntarily executed pre-hire agreement in an action under § 301 without first establishing its majority status. The Eleventh Circuit also correctly cited the distinction drawn by this Court in *Jim McNeff* between a union's attempt to compel negotiations pursuant to a pre-hire agreement, which would require a showing of majority status, and enforcement of monetary obligations incurred by a signatory employer under a pre-hire contract, which does not require a showing of majority status. In this case, however, these issues would become relevant only *after* the union established that all four companies were bound by the agreement.

enforcement of the agreement only against the employer who had signed the agreement, whereas in the case at hand, the union seeks to enforce the collective bargaining agreement against non-signatory companies.

The question which was presented to the Eleventh Circuit in the instant case is preliminary to, and separate from, the question presented in *Jim McNeff*, because when a union seeks to enforce a collective bargaining agreement against a non-signatory, the union must *first* establish a ground for holding the non-signatory to the terms of the agreement. *Pratt-Farnsworth*, 690 F.2d at 503. It is this preliminary determination which the Fifth Circuit held in *Pratt-Farnsworth* requires *both* proof of either a "single employer" or "alter ego" status *and* proof of the appropriate bargaining unit. Only *after* deciding that the agreement binds the non-signatory does the court reach the issue presented in *Jim McNeff*, i.e., whether the union's status aliows it to enforce the agreement against the employer party to the agreement. Thus, the Eleventh Circuit fundamentally misapplied the holding of *Jim McNeff*.

The Eleventh Circuit's misapplication of *Jim McNeff* to the case at hand is made even more apparent by the absence of the critical facts and policies relied upon by the Court in *Jim McNeff*. In *Jim McNeff* the Court stressed the voluntary nature of the contract:

> Neither does respondents' § 301 action trench on the *voluntary* and voidable characteristics of a Section 8(f) pre-hire agreement. It is clear in this case that petitioner entered into the pre-hire agreement *voluntarily*. [footnote omitted] Moreover, . . . it is equally clear that petitioner never

> manifested an intention to void or repudiate the contract.

Jim McNeff, 461 U.S. at 269-270 (emphasis added). By contrast, the Union in the instant case made no allegation in its Complaint that any of the non-signatory companies have voluntarily executed, or otherwise agreed to be bound by, the collective bargaining agreement between the Union and FEC.

Moreover, in *Jim McNeff*, this Court relied upon the policy that an employer who has accepted the benefits of a pre-hire agreement should not be allowed to avoid its obligations to the Union under the agreement. *See Jim McNeff*, 461 U.S. at 270-271. By contrast, in this case the Union never alleged that FI, SFEC, or CEC received or accepted any benefits of the agreement. Thus, the Eleventh Circuit's statement that it saw "no significant distinction between this contract action and that for payments to a fringe benefit trust in *Jim McNeff*" (App. A., p. 9a) is illogical and can only have resulted from a fundamental misreading of *Jim McNeff*.

Furthermore, the Eleventh Circuit's doubts about the continuing vitality of *Pratt-Farnsworth* in light of this Court's decision in *Jim McNeff* (App. A, p. 11a, n. 4) also is a misapplication of *Jim McNeff*, not only for the reasons stated above, but also because this Court denied a petition for certiorari in *Pratt-Farnsworth after* issuing its decision in *Jim McNeff*.[5] If the Court's decision in *Jim McNeff* meant that the

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[5] The Court decided *Jim McNeff* on April 27, 1983. *See Jim McNeff*, 461 U.S. 260 (1983). On May 23, 1983, the Court, upon review of the union's petition for a writ of certiorari to review the Fifth Circuit's decision in *Pratt-Farnsworth*, invited the Solicitor-General to "file a brief expressing

determination of an appropriate bargaining unit was unnecessary in a union's § 301 suit against non-signatories to the collective bargaining agreement, then presumably the Court would have remanded *Pratt-Farnsworth* for further consideration in light of *Jim McNeff*. The Court's decision to deny the petition for certiorari in *Pratt-Farnsworth* indicates, contrary to the Eleventh Circuit's opinion, that the Court's decision in *Jim McNeff* does not affect the requirement that the court make an independent "appropriate bargaining unit" determination.

In addition to its misconstruction and misapplication of *Jim McNeff*, the Eleventh Circuit fundamentally misconstrued this Court's decision in *South Prairie Construction Co. v. Local 627*, 425 U.S. 800 (1976), and thus reached a decision contrary to the policy enunciated in, and the spirit of, *South Prairie*. *South Prairie* is the seminal case in establishing the law relating to so-called "double breasted" operations and the application of the "single" employer and the "alter ego" theories to determine whether the non-signatory employer should be bound by the collective bargaining agreement. In the case at hand, the Eleventh Circuit distinguished *South Prairie* on the basis that *South Prairie* "involved a union's claim to be the *collective bargaining representative* of the employees of a non-signatory subentity of a 'single employer' signatory to a prehire

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the views of the United States." *See Pratt-Farnsworth, Inc. v. Carpenters Local Union No. 1846*, 461 U.S. 942 (1983). Then, on October 31, 1983, the Court denied the union's petition for review of the Fifth Circuit's decision in *Pratt-Farnsworth*. *See* 464 U.S. 335 (1983).

agreement." (App. A, p. 11a, n. 4.) This distinction is a fundamental misconstruction of the *South Prairie* decision.

South Prairie involved an appeal from an unfair labor practice case brought before the Board, in which the union alleged that the signatory and non-signatory employers constituted a "single employer" for purposes of applying the union's collective bargaining agreement. Contrary to the Eleventh Circuit's description, however, it is clear that the remedy sought in *South Prairie* was to bind the non-signatory employers to the collective bargaining agreement.[6] Accordingly, the remedy sought in *South Prairie* is the same as that sought by the Union in the case at hand.

In *South Prairie*, this Court did not question whether the independent "appropriate bargaining unit" determination was necessary, but rather focused on the appropriate body to make that determination. Furthermore, the Court did not draw a distinction between charges brought before the Board to enforce a collective bargaining agreement and suits brought in federal court under § 301. Thus, the *policy* established by *South Prairie* is that in order to enforce a collective bargaining agreement against a non-signatory company, there must be an appropriate bargaining unit determination, regardless of the forum in which the suit is brought.

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[6] As the Court stated, the union claimed that the signatory and non-signatory "had violated §§ 8(a)(5) and (1) of the National Labor Relations Act . . . by their continuing refusal to apply to [the non-signatory employer's] employees the collective bargaining agreement in effect between the union and [the signatory employer]." *South Prairie*, 425 U.S. at 801.

By ignoring the fundamental similarities between the *South Prairie* case and the case at hand, the Eleventh Circuit has effectively held that if the Union brings this claim in federal district court, no bargaining unit determination is necessary; however, if the Union brings this identical action before the Board, then an "appropriate bargaining unit" determination must be made. Such a meaningless distinction merely promotes forum shopping. As the Fifth Circuit stated in *Pratt-Farnsworth*:

> . . . It would be inconsistent with the congressional mandate to fashion the law under section 301 from the policy of our national labor laws to say that the policies found controlling in the unfair labor practice context . . . may be disregarded by the district court in the present suit under section 301 and thus to permit the rights and obligations of the parties to vary with the forum.

Pratt-Farnsworth, 690 F.2d at 513. Accordingly, the Eleventh Circuit's decision violates, if not the letter, at least the spirit, of *South Prairie*.

Because the Eleventh Circuit has fundamentally misconstrued and misapplied the Supreme Court decisions which embody the federal labor law applicable to "single employer" and "alter ego" cases, this Court should review the Eleventh Circuit's decision and establish the correct application of labor policy, as developed in *Jim McNeff* and *South Prairie*, in order to settle this exceptionally important question of federal labor law.

III. WHETHER THE BOARD MUST MAKE THE INITIAL "APPROPRIATE BARGAINING UNIT" DETERMINATION IS A QUESTION OF EXCEPTIONAL IMPORTANCE IN FEDERAL LABOR LAW UPON WHICH THE CIRCUIT COURT DECISIONS ARE IN CONFLICT.

The District Court correctly dismissed the Union's action because the Union had not obtained an "appropriate bargaining unit" determination from the Board. (See App. B, p. 15b.) In its appeal to the Eleventh Circuit, the Union argued that if the "appropriate bargaining unit" determination was required, the District Court had concurrent jurisdiction to make that determination.

The Eleventh Circuit did not reach this jurisdictional issue; however, if this Court determines that an "appropriate bargaining unit" determination is required and remands this case to the Eleventh Circuit, then that court must face the jurisdictional question. Because there exists a conflict between the circuit courts on the issue of whether the Board has exclusive jurisdiction to make the initial "appropriate bargaining unit" determination, this Court should settle this important issue of federal labor policy.

In *South Prairie*, the Court held that in determining whether a non-signatory company was bound by the collective bargaining agreement under the "single employer" theory, the Court of Appeals exceeded its function by determining whether the employees of the two firms constituted an appropriate bargaining unit, because "the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not

final is rarely to be disturbed.' " *South Prairie*, 425 U.S. at 805-06.

Relying on *South Prairie*, the Eleventh Circuit stated in *Board of Trustees, Container Mechanics Welfare/Pension Fund v. Universal Enterprises, Inc.*, 751 F.2d 1177 (11th Cir. 1985) that:

> [i]t is certainly true that often times the existence of a collective bargaining agreement depends on the existence of an appropriate bargaining unit, *which only the NLRB may determine.*

Id. at 1184 (emphasis added).[7]

Similarly, the Ninth Circuit held that:

> [w]hile § 301 grants the district court jurisdiction to decide whether employers constitute a single employer, we conclude that it does not extend to the determination of the second part of the issue, the appropriateness of the bargaining unit.

Brotherhood of Teamsters, Local No. 70 v. California Consolidators, Inc., 693 F.2d 81, 83 (9th Cir. 1982), *cert. denied*, 469 U.S. 887, *reh'g denied*, 469 U.S. 1066 (1984). The court noted that "sound policy reasons counsel against initial determination

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[7] In *Universal Enterprises*, the Eleventh Circuit held that the district court has jurisdiction under § 301 to determine whether a wholly owned subsidiary which had taken over the operations of the parent was bound by a retroactive wage increase made pursuant to the collective bargaining agreement signed by the parent. The court indicated that after finding "alter ego" status, the next step generally would be an "appropriate bargaining unit" determination by the Board; however, such a determination was unnecessary only because the subsidiary merely took over the parent's operation, without any change in employees (who had already been determined to constitute an appropriate bargaining unit). *Id.* at 1184.

of unit questions by the courts. Most significant among them is to avoid the potential for creating a 'tangled mass of judicial and administrative conflict.' " *Id.* at 83, n. 3 (citation omitted).

Conversely, in *Pratt-Farnsworth*, the Fifth Circuit held that the district court may make the "appropriate bargaining unit" determination where a decision on that issue is essential to the resolution of the breach of contract claim. *Pratt-Farnsworth*, 690 F.2d at 517. In reaching its decision, the Fifth Circuit distinguished *South Prairie* on the grounds that in *South Prairie*, the union initially brought the action before the Board, but the Board did not reach the issue of the appropriate bargaining unit. Therefore, the Fifth Circuit reasoned, in *South Prairie* the Court was merely returning the case to the forum in which it was pending for the bargaining unit determination. *Pratt-Farnsworth*, 690 F.2d at 514-15.

The question of the proper forum for the initial "appropriate bargaining unit" determination is even further complicated by the Fifth Circuit's note in *Pratt-Farnsworth* that although none of the parties raised the issue of "primary jurisdiction" in relation to this question, the court strongly recommended that the issue be briefed, not only by the parties, but also by the Board. *Pratt-Farnsworth*, 690 F.2d at 515-16, n. 11. The court explained that by "primary jurisdiction" it did not refer to the pre-emption doctrine, but rather to the court's refraining from exercising its jurisdiction and "referring questions within an administrative agency's expertise to that agency while the federal court stays or dismisses the main action pending the agency's determination." *Id.* (Emphasis added.) Thus, the

Fifth Circuit's decision in *Pratt-Farnsworth* also leaves open the question whether the federal court, even if it has jurisdiction to make the unit determination, should refrain from exercising its jurisdiction.

Because there is a conflict between the opinions of the circuit courts on this jurisdictional issue, and because this issue must be faced by each court determining whether a non-signatory employer should be bound to the collective bargaining agreement, this Court should settle this important question of federal labor law.

CONCLUSION

In its decision, the Eleventh Circuit abandoned and contradicted the federal labor law as developed by this Court, the courts of appeals, and the Board. By misconstruing and misapplying Supreme Court precedent, the Eleventh Circuit has created a conflict between the circuits on a question of exceptional importance in federal labor law, that is, whether an "appropriate bargaining unit" determination must be made in a § 301 breach of contract action in order to enforce the collective bargaining agreement against non-signatories pursuant to the "single employer" or "alter ego" theories. Additionally, the Eleventh Circuit has left unsettled the equally important jurisdictional question whether the "appropriate bargaining unit" determination must be made by the Board in the first instance. Accordingly, the Court should grant this petition and review the Eleventh Circuit's decision in order to settle these important questions of federal labor law.

Respectfully submitted,

IRA J. SMOTHERMAN, JR.
(Counsel of Record)

ADRIENNE L. ANDERSON
STOKES, SHAPIRO, FUSSELL & WEDGE
2300 First Atlanta Tower
Atlanta, Georgia 30383
(404) 658-9050
Counsel for Fowler Industries, Inc.; Fowler Electric Co., Inc.; Steve Fowler Electrical Contractors, Inc.; Clark Electrical Contractors, Inc. and Samuel Lewis Fowler, Jr.

APPENDICES

Appendix A

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 613, Plaintiff-Appellant,

v.

FOWLER INDUSTRIES, INC., Fowler Electric Co., Inc., Steve Fowler Electrical Contractors, Inc., Clark Electrical Contractors, Inc., Samuel Lewis Fowler, Defendants-Appellees.

No. 88-8644.

United States Court of Appeals,
Eleventh Circuit.

Sept. 25, 1989.

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

Plaintiff-Appellant International Brotherhood of Electrical Workers, Local Union 613 (the Union) brought this action against Samuel Lewis Fowler (Fowler), Fowler Industries, Inc. (FI), Fowler Electric Co., Inc. (FEC), Steve Fowler Electrical Contractors, Inc. (SFEC), and Clark Electrical Contractors, Inc. (CEC) under Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a) (1982), alleging that defendants had breached a prehire

agreement executed in 1962 between the Union and FEC and that Fowler, FI, SFEC and CEC had tortiously interfered with the contract and with the Union's business. The district court granted defendants' motion to dismiss the action for lack of subject matter jurisdiction. 691 F.Supp. 1431. We reverse.

I. BACKGROUND

For many years, Fowler owned and operated FEC as a union shop performing electrical subcontracting services in the Atlanta area.[1] In April of 1983, Fowler created two new corporations, FI and SFE. Like FEC, SFE is an electrical subcontracting company. FI, a holding company to which FEC transferred all its tools and equipment, now owns 100% of the stock of both FEC and SFE as well as 49% of the stock of CEC, another electrical subcontracting business.[2]

Of the three subcontracting firms, only FEC operates as a union shop. The Union's complaint alleges that the failure of SFE and CEC to pay union scale and to provide other benefits prescribed by the prehire agreement constitutes a breach of that agreement, because SFE and CEC, although not signatories to the agreement, are bound to its terms as

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[1] Fowler first executed a prehire agreement with appellant Union, which represents electrician craftsmen in the Atlanta area, in 1962. Thereafter, Fowler and the Union executed successive labor agreements, the most recent of which was in effect when the Union filed this action. During the entire period from 1962 through the present, FEC has paid its employees wages and benefits fixed by the prehire agreement.

[2] CEC was formed in July of 1983. Fifty-one percent of its stock is owned by Leonard Clark, who is not a party to this litigation.

subentities of a "single employer" or as "alter egos" of FEC.[3]

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[3] As the Fifth Circuit observed in *Carpenters Local 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir.1982), *cert. denied*, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983),

> [t]he single employer doctrine is a creation of the Board which allows it to treat two or more related enterprises as one employer within the meaning of section 2(2) of the NLRA, 29 U.S.C. § 152(2). Often the doctrine is invoked to combine the amount of business of two or more employers so that the whole will exceed the Board's self-imposed jurisdictional minimum.... The doctrine is not, however, limited to use only as a jurisdiction tool. The finding that two entities are a single employer may have the consequence of treating them as one for purposes of considering the existence of an unfair labor practice in a proceeding before the Board.... The factors which the Board uses to determine the existence of single employer status are (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership.

690 F.2d at 504 (citations omitted). In determining whether single employer status exists, however,

> no one of the [foregoing] factors is controlling, *NLRB v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 21 (9th Cir.1971), nor need all criteria be present. Single employer status ultimately depends on "all the circumstances of the case" and is characterized as an absence of an "arm's length relationship found among unintegrated companies." *Local 627 International Union of Operating Engineers v. NLRB*, 171 U.S.App.D.C. 102, 107, 108, 518 F.2d 1040, 1045-46 (1975), *aff'd on this issue sub nom. Southern Prairie Construction Co. v. Local 627, International Union of Operating Engineers*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976).

NLRB v. Don Burgess Const. Corp., 596 F.2d 378, 384 (9th Cir.), *cert. denied*, 444 U.S. 940, 100 S.Ct. 293, 62 L.Ed.2d 306 (1979).

The "alter ego" doctrine, which differs slightly from the "single-employer" theory, often applies when ownership of an employer changes hands:

In support of its claim for breach of the agreement, the Union alleges that twenty-three former employees of FEC were transferred to FI or SFE, that at least some of FEC's customers have become customers of SFE, that all appellees occupy building space FEC occupied alone prior to April of 1983, that FI now rents to both the union (FEC) and non-union (SFE & CEC) shops the tools and equipment formerly owned by FEC, that FI provides FEC, SFE and CEC with identical bookkeeping, accounting, data processing, payroll, and billing services as well as insurance advice, that FEC, SFE and FI file consolidated tax returns, that money is advanced between the corporations on an as-needed basis, that loans among the companies are not memorialized by formal agreements, that Fowler, as the lone stockholder of FI, is solely responsible for naming the boards of directors of

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> Although a bona fide successor is not in general bound by a prior collective bargaining agreement, an alter ego will be so bound. . . . This is because an employer will not be permitted to evade its obligations under the NLRA by setting up what appears to be a new company, but is in reality a "disguised continuance" of the old one . . . .
>
> In deciding whether a company is an alter ego, the Board will often look to factors which bear some similarity to those involved in a single employer question; in particular, whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision and ownership. . . . However, the focus of the alter ego doctrine, unlike that of the single employer doctrine, is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations. . . . Further, an alter ego case frequently contains specific findings on the substantial continuity of the work force from the union to the non-union employer.

Pratt-Farnsworth, 690 F.2d at 507-08 (citations omitted).

FI, FEC and SFE, and that Fowler effectively controls CEC, as its majority shareholder, Leonard Clark, can neither issue cheeks on the CEC account without the countersignature of a Fowler family member nor bid on projects in excess of $25,000.00 without Fowler's approval. The Union also complains that Fowler, FI, SFE and CEC have tortiously interfered with its business and with its contract with FEC.

Appellees moved to dismiss the complaint or, alternatively, for summary judgment, asserting that, even if the Union's "single employer" and "alter ego" claims are meritorious, enforcement of the prehire agreement against SFE and CEC is proper only after a determination by the NLRB that the combined work forces of FEC, SFE and CEC constitute the appropriate unit for collective bargaining under the LMRA. Appellees also argued that the state law, tortious-interference claims were preempted by section 301 and, alternatively, that, as pendent state-law claims, they should be dismissed along with the federal-question "single employer" and "alter ego" claims. The district court granted the motion to dismiss, concluding that the determination of the appropriate bargaining unit under the LMRA was an essential element of the Union's "single employer" and "alter ego" claims, that such a determination was within the exclusive jurisdiction of the NLRB, and that the court would have subject matter jurisdiction of the Union's claims only after a determination of the appropriate bargaining unit by the NLRB.

II. DISCUSSION

Section 8(f) of the NLRA, 29 U.S.C. § 158(f) (1982), "allows construction industry employers and unions to enter into agreements setting the terms and conditions of

employment for the workers hired by the signatory employer without the union's majority status first having been established" under section 9 of the NLRA. *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266, 103 S.Ct. 1753, 1756, 75 L.Ed.2d 830 (1983); *see also Plumbers and Pipefitters Local Union 72 v. John Payne Co., Inc*, 850 F.2d 1535, 1539 (11th Cir.1988). Although execution of a section 8(f) prehire agreement gives a union signatory neither the right to picket in order to compel a construction industry employer to negotiate, *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers*, 434 U.S. 335, 98 S.Ct. 651, 54 L.Ed.2d 586 (1978) (*Higdon*), nor the right to maintain an action for recognition as the exclusive bargaining representative for a group of employees, *Local No. 3-193, Int'l Woodworkers of America v. Ketchikan Pulp Co.*, 611 F. 2d 1295 (9th Cir.1980); *NLRB v. Don Burgess Const. Corp.*, 596 F.2d 378 (9th Cir.), *cert. denied* 444 U.S. 940, 100 S.Ct. 293, 62 LEd.2d 306 (1979); *Local 627, Int'l Union of Operating Engineers v. NLRB*, 518 F.2d 1040 (D.C.Cir.1975) *rev'd on other grounds sub nom., South Prairie Const. Co. v. Local 627, Int'l Union of Operating Engineers*, 425 U.S. 800, 96 S.Ct. 1842, 48 L.Ed.2d 382 (1976) (*Peter Kiewit*), until the union achieves majority status in an appropriate collective-bargaining unit, a union signatory may enforce the economic terms of a voluntarily executed prehire agreement in an action under section 301(a), regardless of the union's majority status. *Jim McNeff*, 461 U.S. at 269, 103 S.Ct. at 1758. Accordingly, we have held that an NLRB determination of the appropriate collective-bargaining unit is not a prerequisite to a signatory union's section 301 action to enforce the economic terms of a prehire agreement. *John Payne*, 850 F.2d at 1537 (disposition of union's suit to enforce monetary obligations incurred by construction industry em-

ployer under prehire agreement "would not require the district court to decide any representational issues, or other LMRA questions, that fall within the primary jurisdiction of the NLRB").

Against this background, the Union makes two arguments. First, citing *Jim McNeff*, the Union contends that the district court erred by concluding that a determination of the appropriate collective bargaining unit is a prerequisite to this action. Alternatively, the Union argues that, even if determination of the appropriate collective bargaining unit is necessary, the district court erred by holding that it has no jurisdiction to make that determination. For this proposition, the Union cites *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 521 (5th Cir.1982) ("[W]here [a unit determination] is essential to the disposition of contractual rights in a section 301 action . . . , a district court has the power to decide it, at least in the absence of a previous or pending determination by the [NLRB]."), *cert. denied*, 464 U.S. 932, 104 S.Ct 335, 78 L.Ed.2d 305 (1983). Because we agree with the Union's first contention, we need not address the second.

In *Jim McNeff*, a construction subcontrator signatory to a union's master labor agreement failed to make contractually required contributions to the union's fringe benefit trust funds. The trustees sued under section 301, and the subcontractor argued that the contract was not enforceable unless and until the union demonstrated majority status in an appropriate bargaining unit. A demonstration of majority status, of course, would have necessitated a determination of the appropriate bargaining unit.

Rejecting the subcontractor's argument, the Supreme Court noted a "critical distinction" between section 301 actions to enforce prehire agreements and those seeking recognition of the union as the exclusive bargaining representative of a group of employees. 461 U.S. at 267, 103 S.Ct. at 1757. Unlike attempts to compel negotiations, an action to enforce a voluntarily executed prehire agreement, the Court observed, does not impinge upon the representational interests of the defendant's employees:

> Union enforcement, by way of a § 301(a) suit, of monetary obligations incurred by an employer under a prehire contract prior to its repudiation does not impair the right of employees to select their own bargaining agent. . . . [E]nforcement of accrued obligations in a § 301 suit does not mean that the union represents a majority of the employer's employees. In a § 301 suit, the District Court merely enforces a contract entered into by the employer—a contract that Congress has legitimated to meet a special situation even though employees themselves have no part in its negotiation or execution. Such enforcement does not grant the plaintiff union a right otherwise enjoyed only by a majority union except in the very narrow sense, expressly intended by Congress, that employers and minority unions in the construction industry do not violate the Act by entering into prehire agreements. There is no sense in which respondents' contract action has a recognitional purpose . . .

103 S.Ct. at 1758. The Union contends, as we held in *John Payne, supra,* that this language makes clear that a determination of the appropriate collective bargaining unit is not

a prerequisite to a section 301 suit to enforce an employer's monetary obligations under a prehire agreement.

Finding the Union's reliance on *Jim McNeff* inapposite, the district court stressed that, in *Jim McNeff* the Supreme Court held only that monetary obligations assumed under a prehire agreement "are enforceable as to the *signatory* parties to that agreement without a showing of majority support for the union." (emphasis added). Attempting to distinguish *Jim McNeff*, the district court reasoned that "([i]n *Jim McNeff*, unlike the present action, *there was no question of who was bound* by the prehire agreement, and there was *no attempt by the union to expand the unit* beyond the employees of the signatory employer." (emphasis added). This language indicates to us that the district court misperceived both the significance of the Union's legal theory and the effect of this litigation upon SFE's and CEC's employees.

The Union argues that FI, SFE and CEC are bound to the terms of the prehire agreement by virtue of their status as subentities of a "single employer" (FEC) that indisputably *is* a signatory to the agreement. Alternatively, the Union argues that FI, SFE and CEC are bound as "alter egos" of FEC. The Union requests only a declaration that FI, SFE and CEC are so bound and an order directing their performance. We see no significant distinction between this contract action and that for payments to a fringe benefit trust in *Jim McNeff*. As in *Jim McNeff*, the Union does not claim to be entitled to compel FI, SFE and CEC to negotiate or to execute a new prehire agreement. Nor does the Union seek a declaration that it is the exclusive collective bargaining representative of any of appellees' employees. Instead, the Union seeks only a determination that the four

corporate defendants are in fact a "single employer" that has breached a valid prehire agreement. The requested determination requires nothing more than an interpretation of the contract language in light of federal law governing "single employer" and "alter ego" status. If the Union prevails on the merits of either its "single employer" or its "alter ego" claim, the contract language itself will determine the employees to whom FI, SFE and CEC owe the pay and benefits specified by the agreement. Therefore, no unit determination is logically necessary.

Neither is a unit determination necessary to vindicate national labor policy, for, contrary to the district court's perception, enforcement of the prehire agreement against FI, SFE and CEC will not erode the section 7 representational rights of their employees. Assuming (as we must at this stage) the validity of the Union's legal theory, the employees of SFE and CEC already are covered by the prehire agreement. The Union is seeking merely to enforce its contract with respect to all the employees working for what the Union contends is a single employer. Thus, an order requiring FI, SFE and CEC to abide by the agreement will not expand the reach of the agreement or that of the Union. Indeed, the district court's contrary conclusions follow only if one assumes that the corporate defendants are *not* a single employer—that is, only if one ignores the rule governing evaluation of motions to dismiss for lack of subject matter jurisdiction and assumes the *in*validity of the Union's legal theory. Viewed in the proper light, the enforcement of the agreement against all appellees does not implicate the representational desires of any of the appellees' employees, who remain free to petition for and to elect an exclusive representative pursuant to section 9 of the LMRA.

Therefore, under the reasoning of *Jim McNeff*, no determination of majority status in an appropriate bargaining unit is required in this case.[4]

Accordingly, the judgment of the district court is REVERSED, and the case is REMANDED to that court for further proceedings consistent with this opinion.

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[4] We realize that our holding is directly contrary to that of *Pratt-Farnsworth*, in which the new Fifth Circuit held that enforcement of the economic terms of a prehire agreement against a non-signatory subentity of a single employer

> requires a showing that the two subentities are a single employer and then requires a further *independent* determination that their employees constitute an appropriate bargaining unit. . . . The decision that the employees of the two subentities constitute an appropriate unit is . . . crucial to liability under the single employer theory . . . [and] . . . cannot be disguised in contractual garb but must be encountered head-on as a bona fide representational issue.

690 F.2d at 520-21. Each of the cases principally relied upon by the *Pratt-Farnsworth* panel, *Don Burgess*, *Ketchikan*, and *Peter Kiewit*, however, involved a union's claim to be the *collective bargaining representative* of the employees of a non-signatory subentity of a "single employer" signatory to a prehire agreement. Given the Supreme Court's admonitions in *Jim McNeff* that "[t]here is a critical distinction between an employer's obligation under the Act to bargain with the representative of the majority of its employees and its duty to satisfy lawful contractual obligations that accrued after it enters [sic] a prehire contract," 103 S.Ct. at 1757, and that "monetary obligations assumed by an employer under a prehire contract may be recovered in a § 301 action brought by a union prior to the repudiation of the contract, even though the union has not attained majority support in the relevant unit," 103 S.Ct. at 1759, we doubt the continuing vitality of *Pratt-Farnsworth* in the context of § 301 actions to enforce the economic terms of prehire agreements. Thus, we decline to follow that decision.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

International Brotherhood
of Electrical Workers,
-Local 613,

v.

Fowler Industries, Inc., et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER: No. 1:87-cv-552:CAM

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to consideration before the Court. The issues have been considered and a decision has been rendered, GRANTING defendants' motion to dismiss complaint. IT IS ORDERED AND ADJUDGED that the plaintiff take nothing, that the action be dismissed and that the defendants, Fowler Industries, Inc., Fowler Electric Co., Omc., Steve Fowler Electrial Contractors, Inc., Clark Electrical Contractors, Inc., and Samuel Lewis Fowler, Jr., recover from plaintiff, International Brotherhood of Electrical Workers, Local 613, their costs of action.

FILED in the Clerk's Office
July 21, 1988
ENTERED ON DOCKET
July 28, 1988
LUTHER D. THOMAS, Clerk

By: /s/ Brinkly Flanigan
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 613

v.

FOWLER INDUSTRIES, INC.; FOWLER ELECTRIC CO., INC.; STEVE FOWLER ELECTRICAL CONTRACTORS, INC.; CLARK ELECTRICAL CONTRACTORS, INC.; and SAMUEL LEWIS FOWLER, JR., INDIVIDUALLY

1:87-cv-552-CAM

ORDER

The above-styled action is before this Court on the defendants' motion for dismissal of the complaint or for summary judgment on jurisdictional grounds. For the reasons stated below, the Court GRANTS the defendants' motion to dismiss the complaint without prejudice.

I. FACTS

This action was brought under section 301 of the National Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a) (1982), by International Brotherhood of Electrical Workers, Local 613 ("Local 613"), a Labor organization, against four corporate defendants. The plaintiff alleges breach of a collective bargaining agreement by the defendants. Defendant Fowler Electric Company, Inc. ("FEC") has continuously been a signatory to said collective

bargaining agreement, or a successor agreement, with Local 613, since 1962. Defendant Fowler Industries, Inc. ("FI"), Steve Fowler Electrical Contractors, Inc. ("SPEC") and Clark Electrical Contractors, Inc. ("CEC") were incorporated and started in business in 1983. None of the latter three entities have executed any collective bargaining agreements with the plaintiff.

The final defendant, Samuel Lewis Fowler, ("Fowler") an electrical subcontractor, has for many years owned and operated FEC. It is undisputed that FEC has been a union shop since 1962, when Fowler first executed a prehire agreement with the plaintiff union which represents electrician craftsmen in the Atlanta area. Thereafter, Fowler and the union executed successive labor agreements for FEC, up to and including the time this action was filed. During the entire period from 1962 through the present, FEC has paid its employees wages and benefits fixed by the union contract.

Defendants SFEC and CEC, both formed in 1983, are also in the electrical contracting business, but neither has ever been a party to any collective bargaining agreement with Local 613. The defendants assert that there has been little or no interchange of apprentices, electricians, or foremen between FEC, SFEC and CEC. The defendants further assert that due to the nature of the contracting business, the field employees of FEC, SFEC and CEC report to work at their respective job sites, and have no contact with each other on their separate job sites.

On the other hand, plaintiff claims that Fowler attempted to create nonunion subcontracting businesses by a series of corporate transactions designed to create a sepa-

ration between the union and nonunion enterprises. FI was created to serve in part as a holding company for FEC, SFEC, and CEC. FI became the sole stockholder of both FEC and SFEC. Samuel Lewis Fowler owns all the stock of FI.

The plaintiff asserts that when Fowler created FI and SFEC, he transferred all the tools, equipment and vehicles owned by FEC to the holding company and thereafter rented them to both the union and nonunion enterprises. He also created identical administrative service agreements under which FI provided both contractors with bookkeeping, accounting, data processing, payroll, billing, invoicing, and treasury and insurance advice. The services are provided by the same individuals. Since their inception, the new corporations have operated out of the same building and used the same legal and accounting advisors. FE, SFE, and FI file consolidated tax returns, and money is advanced between the corporations on an as needed basis.

Plaintiff further asserts that in 1983, 23 former employees of FEC went to work for FI or SFEC in such positions as engineer, estimator, project manager, journeymen, electrician, warehouse and clerical help. However, according to Fowler, employees who transferred from the union shop to one of the new corporations quit working at FEC before applying for employment at SFEC. Finally, the plaintiff asserts that although CEC is labeled a minority business due to the fact that a Mr. Clark owns 51 percent of the stock, Fowler retains 49 percent of the stock and extensive control of operations. Thus, the plaintiff claims that FEC, FI, SFEC, and CEC are all bound to the prehire agreement signed by FEC because they are all parts of a single employer.

Counts one and two of the complaint allege that defendants FI, FEC, SFEC, and CEC are collectively bound to the collective bargaining agreement entered into between FEC and Local 613. In count one the plaintiff claims that all these defendants are a single integrated operation under the National Labor Relations Board's ("NLRB") "single employer" doctrine. Count two of the complaint similarly alleges that an "alter ego" relationship exists between FI, FEC, SFEC, and CEC such that all are bound by the collective bargaining agreement.

The complaint was amended on October 26, 1987, adding defendant Samuel Lewis Fowler and an additional count. Count three of the amended complaint alleges that Fowler, FI, SFEC, and CEC have tortiously interfered with the contract between FEC and Local 613 and have tortiously interfered with union business.

Defendants have filed a motion to dismiss the complaint or for summary judgment on jurisdictional grounds.

II. COUNTS I AND II OF THE COMPLAINT

A. Determination of the "Appropriate Bargaining Unit" Is Required Under Both the "Single Employer and "Alter Ego" Theories.

Under the "single employer" theory, two determinations must usually be made in order to bind non-signatory employers like SFEC and CEC to a collective bargaining agreement. First, it must be determined that the signatory employer, in this case FEC, and any non-signatory employer(s), under "all circumstances of the case" and in "the absence of an arms-length relationship" constitute, in

fact, a single employer.[1] *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 505 (5th Cir. 1982). However, the mere finding of single employer status is insufficient to bind the non-signatory employers to the collective bargaining agreement. *Id. See also, South Prairie Construction Company v. Local No. 627*, 425 U. S. 800, 805, 96 S. Ct. 1842, 1844 (1976). Second, there must also be a determination of the appropriate bargaining unit. *Pratt-Farnsworth*, 690 F.2d at 505. A finding of single employer status does not establish the appropriate bargaining unit. *South Prairie*, 425 U. S. at 805.

The alter ego theory, which forms the basis for Count II of the complaint, involves consideration of factors similar to those considered under the single employer doctrine. *Pratt-Farnsworth*, 690 F.2d at 507. However, the focus of the alter ego doctrine, unlike the single employer doctrine, is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations. *Id.* at 508. The alter ego doctrine requires a less rigorous inquiry into the appropriate bargaining unit than the single employer doctrine when the NLRB is conducting the inquiry. *Id.*

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[1] The NLRB text examines four factors to determine whether two separate entities in fact constitute a single employer:

(1) Interrelation of operations;
(2) Interrelation of management;
(3) Centralized control of labor relations; and
(4) Common ownership.

Id. at 504; *e.g., South Prairie Construction Co. v. Local No. 627*, 425 U. S. 800, 802-03, 96 S. Ct. 1842, 1843 (1976).

Although theoretically applicable to the present situation, the alter ego doctrine is usually used to bind a successor corporation to its predecessor's collective bargaining agreement. *See, Id.; see also, Board of Trustees Container Mechanics Welfare/Pension Fund v. Universal Enterprises, Inc.*, 751 F.2d 1177 (11th Cir. 1985). Therefore, a lesser inquiry into the appropriate bargaining unit by the NLRB is logically justified where a successor corporation has substantially the same structure and employees as did its predecessor under the collective bargaining agreement in issue. The present case is distinguishable from the successor situation in that the Fowler entities are not merely a single successor or even a group of successors to FEC that have simply changed ownership. They are structurally different from FEC with a much different total employee base. Thus, it would appear that a more indepth inquiry into the appropriate bargaining unit is warranted than in the typical successor alter ego case.

The ultimate consideration is that, even absent the immediately foregoing analysis, the alter ego theory, like the single employer theory, involves a unit determination in most cases. The same analysis applies to single employer and alter ego claims in district court as to whether a unit determination is necessary. *See, Universal*, 751 F.2d at 1184. The central assertion of the defendants in their motion to dismiss is that unit determinations are matters of primary NLRB jurisdiction, and therefore this case should be dismissed and the dispute brought before the NLRB.

B. *A Unit Determination Is Necessary in this Case and Such Determination Is to be Made Initially by the NLRB*

The primary assertion on which the defendants rely as the basis for dismissal is that a determination of the proper bargaining unit is required under the theories asserted in the complaint and such determination is initially the province of the NLRB. There is a split of authority as to whether the initial determination of appropriate bargaining unit is reserved to the NLRB. Unfortunately, the Eleventh Circuit has not decided this issue, but in dictum the Circuit Court has provided indications of its position.

The plaintiff relies on the Fifth Circuit Court of Appeals' decision in *Pratt-Farnsworth*, 690 F.2d at 509 for the proposition that unit determinations can be made initially by the district courts in section 301 cases such as the present case. The Fifth Circuit held that LMRA § 301 empowered a federal district court to decide the appropriate bargaining unit where this decision is essential to the resolution of a breach of contract claim, thus circumventing the NLRB's statutory authority under National Labor Relations Act (" NLRA") § 9(b). 690 F.2d at 517. Thus, the *Pratt-Farnsworth* court asserts that LMRA § 301 *always* confers the authority on a district court to determine bargaining unit issues, absent a prior NLRB determination when "alter ego" and single employer" issues are involved.

In contrast to the *Pratt-Farnsworth* holding are statements from two Ninth Circuit cases. *Brotherhood of Teamsters, Local No. 70 v. California Consolidators, Inc.*, 693 F.2d 81, 83 (9th Cir. 1982) (LMRA § 301 grants the district court jurisdiction to determine whether employers constitute a "single employer", but not the appropriateness of the bar-

gaining unit, which is reserved to the NLRB); *Local No. 3-193 International Woodworkers of Am. v. Ketchikan Pulp Co.*, 611 F.2d 1295, 1299 (9th Cir. 1980) ("This declaration of the strong policy of judicial deference to initial determination by the NLRB of representation issues is equally applicable to actions under Section 301.") Furthermore, the *Pratt-Farnsworth* decision conflicts with statements of the law by the Eleventh Circuit in *Computer Sciences Corp. v. N.L.R.B.*, 677 F.2d 804 (11th Cir. 1982), and *Board of Trustees v. Universal Enterprises, Inc.*, 751 F.2d 1177 (11th Cir. 1985).[2] In *Universal* the Eleventh Circuit stated, "It is certainly true that often times the existence of a collective bargaining agreement depends on the existence of the appropriate bargaining unit, *which only the NLRB may determine.*" *Id.* at 1184. (emphasis added.) Thus, the defendant asserts that only in the absence of a bargaining unit issue, or where a prior NLRB unit determination has been made, does the district court have jurisdiction to adjudicate the union's "single employer" or

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[2] Prior to the *Universal Enterprises* decision, Judge Ward cited *Pratt-Farnsworth* as persuasive authority in *International Union of Operating Engineers, Local 926 v. Superior Rigging and Erecting Co.*, 602 F. Supp. 913, 917 (N.D. Ga. 1984). Judge Ward distinguished *South Prairie Construction*, 425 U.S 800, 96 S. Ct. 184 (1976), and *Computer Sciences*, 677 F.2d 804 (11th Cir. 1982), on the grounds that neither of those actions arose in the context of a LMRA § 301 action to enforce a collective bargaining agreement, and the following *Pratt-Farnsworth*, declined to follow the Ninth Circuit's decision in *Brotherhood of Teamsters, Local No. 70 v. California Cosolidators, Inc.*, 693 F.2d 81 (1982) (discussed *supra*). 602 F. Supp. at 917. Judge Ward's conclusion that the fundamental question of who is bound to a contract must necessarily be determined by the district court in a LMRA § 301 action, 693 F.2d at 916, conflicts with the Eleventh Circuit's language in *Universal Enterprises* that "the existence of a collective bargaining agreement [often] depends on the existence of an appropriate bargaining unit, which *only* the NLRB may determine." 751 F.2d at 1184 (emphasis added).

"alter ego" breach of contract claim and award a remedy, binding a non-signatory employer to a collective bargaining agreement.

The plaintiff asserts that a unit determination in this case is unnecessary or irrelevant. First, the plaintiff maintains that the contract executed by FEC already defines the unit of employees to which the contract applies, and thus no unit detemination [sic] is needed. *Pratt-Farnsworth*, 690 F.2d at 523. The recognition clause in the agreement specifies only that defendant FEC, the signatory employer, "recognizes the Union as the sole and exclusive representative of all *its* employees performing work within the [trade and territorial] jurisdiction of" Local 613. (emphasis added). No other defendant has so recognized Local 613, either in writing or otherwise. Therefore, the contract clause does not appear to bind the non-signatory defendants.

Furthermore, if the plaintiff's assertion that the recognition clause in the prehire agreement between FEC and Local 613 establishes an appropriate unit which includes the employees of the non-signatory employers were valid, then the recognition clause would have the same effect as an accretion clause.[3] As the Fifth Circuit stated in *Pratt-Farnsworth*, "enforcing such a clause would be a usurpation of the non-union employees' section 7 rights and the NLRB's exclusive jurisdiction to determine the appropriate bargaining unit." 690 F.2d at 525, n.17 (citing

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[3] An accretion clause purports expand the unit *without* an election as an employer gains new employees through the acquisition of other business enterprises.

Florida Marble Polishers Health and Welfare Fund v. Edwin M. Green, Inc., 653 F.2d 972, 976 (5th Cir. 1981).

However, the plaintiff points out that in *Pratts-Farnsworth*, the Fifth Circuit concluded that a prehire collective bargaining agreement, such as the one in the present case, does not pose the same problems as those associated with an accretion clause. Therefore, the Fifth Circuit held that a prehire agreement can become fully enforceable by a union showing of majority status in the stipulated bargaining unit, rather than by a Board election or voluntary recognition by the employer. However, the distinction drawn by the Fifth Circuit between enforceability of an accretion clause and a unit stipulation in a prehire agreement is no longer valid, because of the dramatic change in the way the Board treats the enforceability of prehire agreements. The *signatory* employer's employees are presumed to be the appropriate unit, and a prehire agreement will become a fully enforceable NLRA section 9(a), 29 U.S.C. § 159(a), collective bargaining agreement only after a NLRA § 9(c) election or voluntary recognition by the employer. *John Deklewa & Sons*, 2282 N.L.R.B. No. 184, 1986-87 NLRB Dec. (CCH) ¶ 18,549 (Feb. 20, 1987), *aff'd sub nom. Iron Workers Local 3 v. NLRB [John Deklewa & Sons]*, 843 F.2d 770 (3d Cir. 1988).

Second, as discussed briefly above in connection with the plaintiff's first contention, the plaintiff claims that the policy considerations normally involved with a unit determination (such as the employees' right to select a bargaining representative and the existence of a community of interests between the employees included in the unit the union seeks) do not apply when the underlying labor

contract is a section 8(f) prehire agreement. The plaintiff cites *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 271-72, 103 S. Ct. 1753, 1759 (1983), in which the Supreme Court held *monetary obligations* assumed under a valid NLRA section 8(f) prehire agreement are enforceable as to the signatory parties to that agreement without a showing of majority support for the union. It does not follow that the Court intended its decision to erode the NLRA section 7 protection of the interests of the employees covered by such a prehire agreement. In *Jim McNeff*, unlike the present action, there was no question of who was bound by the prehire agreement, and there was no attempt by the union to expand the unit beyond the employees of the signatory employer. The issue before the Supreme Court was whether an employer's monetary obligations under a prehire contract could be enforced in a LMRA § 301, 29 U.S.C. § 185, action prior to the effective repudiation of the contract. The Court reasoned that the enforcement of the signatory employer's monetary obligations did not impair the employees' right to freely select their own bargaining agent. Therefore, majority support for the union was not a condition precedent to enforce the contract against the employer, who voluntarily entered into the agreement, obtained the benefits thereof, and failed to live up to his end of the bargain. *Id.* at 269-71, 103 S. Ct. 1758-59.

In the present case, unlike *McNeff*, a unit determination is necessary to insure protection of the section 7 rights of employees of the non-signatory parties. Such a determination is best made initially by the NLRB in the interests of uniformity of standards and insuring that the inquiry is made by a body with expertise in such matters. *See, Computer Sciences*, 677 F.2d at 808.

III. COUNT III OF THE COMPLAINT

Count three of the complaint alleges that the non-signatory Fowler entities, PI, SFEC, and CEC, and Fowler have tortiously interferred with the contract between FEC and Local 613. The parties agree, and the Court concurs, that inasmuch as count three relates to tortious interference with contract, which requires resort to contact [sic] terms to resolve, it should be decided as a matter of federal law. *See, Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

The plaintiff claims independent jurisdiction for count three under 29 U.S.C. § 185. The plaintiff has cited a number of cases establishing that a cause of action for tortious interference with contract exists under section 301 of the LMRA. 29 U.S.C. § 185. *Local 472 v. Georgia Power Co.*, 684 F.2d 721 (11th Cir. 1982); *Wilkes-Barre Publishing Co. v. Newspaper Guild Local 120*, 647 F.2d 372 (3rd Cir. 1981); and *Local 1054 v. West Coast Industrial Relations Association*, ___ F. Supp.___, 116 L.R.R.M. (BNA) 3175 (W.D. Wa. June 21, 1984). *Local 1054 v. West Coast Industrial Relations Association* is the only case cited by plaintiff where a union filed suit against non-signatory parties for tortious interference with its contract with the signatory employer. However, plaintiff failed to advise in its memorandum that this case was later reversed by the Ninth Circuit. *Local 1054 v. West Coast Industrial Relations Association*, 775 F.2d 1042 (9th Cir. 1985). Furthermore, although a few courts appear to have indicated that section 301 subject matter jurisdiction exists over all suits for violation of collective bargaining agreements, *see, Wilkes-Barre*, 647 F.2d at 372; *Painting and Decorating Contractors Ass'n of Sacramento v. Painters and Decorators Joint Committee of the East Bay Counties, Inc.*, 707

F.2d 1067 (9th Cir. 1983), the majority of courts apply a much narrower interpretation of section 301 jurisdiction. A district court does not have subject matter jurisdiction over a non-signatory to a collective bargaining agreement, where no rights or duties of the non-signatory party are stated in the terms of the contract. *Service, Hospital, Nursing Home and Public Employees Union, Local No. 47 v. Commercial Property Services, Inc.*, 755 F.2d 499 (6th Cir. 1985), *citing, Pratt-Farnsworth*, 690 F.2d at 502, *Loss v. Blankenship*, 673 F.2d 942, 946 (7th Cir. 1982); *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421, 423 (1st Cir. 1968); *Fox v. Mitchell Transport, Inc.*, 506 F. Supp. 1346, 1349 (D. Md. 1981), *aff'd mem.*, 671 F.2d 498 (4th Cir. 1981). Therefore, this Court concludes that it only has jurisdiction over count three of the complaint under section 301, if the defendants are bound to the prehire agreement. The defendants in count three will be bound to the prehire agreement only upon a finding that they are so obligated under the "single employer" or "alter ego" doctrines. Either of these findings would again require a determination of the appropriate bargaining unit. As discussed above, such a determination is initially the exclusive province of the NLRB. Therefore, the federal law grounds supporting count three under section 301 involve the same issues as counts one and two and must be dismissed without prejudice.

The question remains as to whether there are any state law grounds supporting count three which are not pre-empted by section 301. If the defendants are ultimately determined to be bound as signatories to the prehire collective bargaining agreement, then it appears that state based claims for tortious interference with contract would be pre-empted by 29 U.S.C. § 185. *See, Allis-Chalmers*, 471 U.S. at 202 (Where the resolution of a state law claim is

substantially dependent on the analysis of the terms of a collective bargaining agreement, the claim must be treated either as a section 301 claim or dismissed as pre-empted by federal labor law.) However, if it is found that the defendants to count three are not bound to the prehire agreement, then a state claim for tortious interference with contract which is not based on a theory requiring analysis of the terms of the contract arguably remains. On the other hand, the possible existence of a valid state law claim again depends on a determination which is initially the exclusive province of the NLRB and requires a fact-dependent finding that no preemptive federal remedy exists. Therefore, even if the state law claim presented by count three is not directly dependent on analysis of the terms of the labor agreement, it is at least indirectly dependent on such analysis and is pre-empted by federal law. *See, Dougherty v. Parsec, Inc.*, 824 F.2d 1477 (6th Cir. 1987).

The clerk is DIRECTED to enter dismissal without prejudice as to all counts enumerated in the complaint. The clerk is further DIRECTED to close this case.

SO ORDERED, this 21 day of July, 1988.

/s/ Charles A. Moye, Jr.
UNITED STATES DISTRICT JUDGE

Appendix C

United States Court of Appeals
For the Eleventh Circuit

No. 88-8644
D.C. Docket No. 1:87-CV-522-CAM

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 613,
Plaintiff-Appellant,

versus

FOWLER INDUSTRIES, INC., FOWLER ELECTRIC CO., INC., STEVE FOWLER ELECTRICAL CONTRACTORS, INC., CLARK ELECTRICAL CONTRACTORS, INC., SAMUEL LEWIS FOWLER,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

Before KRAVITCH and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is

hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: September 25, 1989
For the Court: Miguel J. Cortez, Clerk
By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: NOV. 27, 1989

Appendix D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO- 88-8644

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 613,
Plaintiff-Appellant,

versus

FOWLER INDUSTRIES, INC., FOWLER ELECTRIC CO., INC., STEVE FOWLER ELECTRICAL CONTRACTORS, INC., CLARK ELECTRICAL CONTRACTORS, INC., SAMUEL LEWIS FOWLER,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC
(Opinion September 25, 11 Cir., 1989 ___ F.2d___).
(November 14, 1989)

Before KRAVITCH and CLARK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

Appendix E

STATUTES INVOLVED

Labor Management Relations Act § 301(a), 29 U.S.C.A. §185(a):

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

National Labor Relations Act § 7, 29 U.S.C.A. § 157:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

National Labor Relations Act § 9(b), 29 U.S.C.A. § 159(b):

> (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the

employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.